

Au Meng Nam & Anor v Ung Yak Chew & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01-82 OF 2005
GOPAL SRI RAM, RAUS SHARIF AND HASAN LAH JJCA
12 JULY 2007

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Land Law — Indefeasibility of title and interests — Forged transfer — Bona fide purchaser for value — Whether Adorna Properties case should be followed — Whether indefeasibility applied to immediate purchaser — Whether defendant was purchaser in good faith — Whether careless or negligent purchaser was purchaser in good faith — National Land Code 1965 s 340(2), (b) & (3)

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Land Law — Indefeasibility of title and interests — Forged transfer — Whether duty on plaintiffs to prove that defendant was party or privy to fraud or forgery — National Land Code 1965 s 340(2), (b) & (3)

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The plaintiffs were previously the registered proprietors of the land. On 17 September 1997, they came to know that the land had been transferred to the first defendant vide the registration of the memorandum of transfer in Form 14A on 9 October 1996. The plaintiffs contended that they had never entered into any agreement or signed any document to transfer the land to the first defendant. Two cheats claiming to be the proprietors of the land entered into a sale and purchase agreement of the land with the first defendant. This took place on 9 May 1996. Hence, on 18 September 1997 the plaintiffs lodged a police report stating that the transfer of the land to the first defendant was fraudulent. They subsequently brought this action against the first defendant. The first defendant in his defence contended that he was a bona fide purchaser of the land for valuable consideration within the proviso to s 340(3) of the National Land Code 1965 ('Code') and thus had obtained an indefeasible title to the land. The first defendant, as a fall back position, filed a third party notice against the second and third defendants for compensation or indemnity. He alleged that the second and third defendants were negligent. The second and third defendants were at the material time the partners in the firm of solicitors acting for the first defendant for the purchase and subsequent transfer of the land. The second and third defendants denied any negligence on their part. They too, as a fall back position, brought in the Pentadbir Tanah Daerah Johor Bahru ('the fourth defendant') as the fourth party to this action, claiming for contribution or indemnity. They in turn alleged that the fourth defendant was negligent. On 26 August 2005, the learned trial judge after a full trial, dismissed the plaintiffs' claim. He found it as a fact that the instrument of transfer of the land to the first defendant was a forged document. Nevertheless, applying the Federal Court case of *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241 ('Adorna Properties Sdn Bhd') he held that the first defendant was a bona fide purchaser for value within the proviso to s 340(3) of the Code and thus had acquired an

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A indefeasible title to the land. One of the main issues raised by the plaintiffs in this appeal was that the learned trial judge was wrong to rely on the case of *Adorna Properties Sdn Bhd*. Learned counsel for the plaintiffs submitted that *Adorna Properties Sdn Bhd* was decided per incuriam and should not be followed. Thus, what had to be decided was whether the learned trial judge was right in holding that the first defendant was a bona fide purchaser of the land for valuable consideration so as to fall within the exception to defeasibility under s 340(3) of the Code. Learned counsel for the first defendant, submitted that the findings of the learned trial judge were findings of fact and this court, as an appellate court, should be slow in interfering with such findings.

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Held, allowing the plaintiff's appeal:

- D (1) (per **Raus JCA; Hasan JCA** concurring) The Federal Court should review its decision in *Adorna Properties Sdn Bhd*. By virtue of s 340(2)(b) of the Code, the title of Adorna Properties was not indefeasible as the registration was obtained by forgery. Section 340(3) does not apply to s 340(2). The proviso states 'Provided that in this subsection' and this subsection refers to s 340(3) and not s 340(2). Section 340(3)(a) refers to 'to whom it may subsequently be transferred' which means that the intended purchaser is the subsequent purchaser and not the immediate purchaser. Similarly, in the instant case, the title of the first defendant was defeasible as the registration was obtained by forgery. The first respondent was the immediate purchaser and not a subsequent purchaser. Section 340(3) has no application as it refers to subsequent purchaser and not the immediate purchaser. Thus, the plaintiffs would have succeeded in this appeal if not for the Federal Court interpretation of s 340 of the Code in *Adorna Properties Sdn Bhd*. But this court is not ready to ignore or disregard the Federal Court's decision in *Adorna Properties Sdn Bhd* (see paras 34–35); *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241 followed.
- E (2) (per **Raus JCA; Hasan JCA** concurring) The findings of the learned trial judge did not solely turn on a question of fact. It was a mixed question of fact and law. Thus, even if the findings of the learned trial judge were based on factual ground it did not absolve this court of doing its duty as an appellate court (see para 38).
- G (3) (per **Raus JCA; Hasan JCA** concurring) An existence of a sale and purchase agreement and the payment of the purchase price in full could not be the only indicator to show whether a person is a bona fide purchaser or otherwise. Other salient features surrounding the sale and purchase agreement must be considered (see para 41). In the present case, had the learned trial judge taken other facts and circumstances into consideration, he could not possibly conclude that the first defendant was a bona fide purchaser for valuable consideration, so as to be protected under s 340(3) of the Code. The first defendant had concluded the sale without any proper investigation into the title or the persons claiming to be proprietors. No doubt he had every right to take advantage of the low price that was offered to him but he took the risk. When he embarked into such risk, it could not be at the expense of the
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plaintiffs. In such circumstances the court must not favour the first defendant over the plaintiffs. To do so, would be doing injustice to the plaintiffs (see para 42). Further, had the evidence adduced in this case been properly considered and assessed by the learned trial judge, a reasonable inference would be that the first defendant knew at the time he bought the land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase. In doing so he disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. A purchaser in good faith does not include a purchaser who is careless or who had been negligent (see para 43).

- (4) (per **Raus JCA; Hasan JCA** concurring) The first defendant was under the obligation to investigate properly all matters relating to the sale of the land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions which ought to be taken in such a matter he was not entitled to the protection of the court (see para 44).
- (5) (per **Raus JCA; Hasan JCA** concurring) Since the first defendant was relying on the proviso of s 340(3) of the Code, that he was a bona fide purchaser for valuable consideration, the evidential burden fell on him. The evidential burden remained with the first defendant. There was no duty on the plaintiffs to prove that the first defendant was a party or privy to the fraud or forgery (see para 45).
- (6) (per **Raus JCA; Hasan JCA** concurring) No liability could be attached against the second and third defendants. The first defendant had adduced no evidence at the trial to support the allegation that the second and third defendants were negligent. Moreover from the circumstances of the transaction it clearly indicated that the first defendant took a commercial decision to purchase the land which he admitted was a good bargain. In a single day, he visited the land, decided to purchase it and agreed to the term of the sale including an initial payment of 80% of the purchase price in cash. These were done before the first defendant consulted the second defendant. The second defendant in his evidence stated that when the first defendant came to see him, he informed him (first defendant) of the risk. But according to the second defendant, the first defendant who was a regular client and was familiar with sales and purchase of real property, wanted to proceed with the transaction urgently. The second defendant further testified that instructions were given to him to prepare the terms as had already be agreed upon. Certainly, under such circumstances the second and third defendants could not be blamed. Accordingly the first defendant's claim against the second and third defendants was dismissed (see para 47).
- (7) (per **Gopal Sri Ram JCA**) The decision in *Adorna Properties Sdn Bhd* is not to be treated as binding precedent because it was decided per incuriam (see para 13). It is central to the doctrine of indefeasibility housed in s 340 that the issue document of title must itself be genuine. In *Adorna Properties Sdn Bhd*, the instrument of transfer and other attendant documents were forged. But the title was genuine. In the present appeal there was cogent evidence going to show that the issue document of title used to effect the transaction

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- A here was itself a forgery. Hence *Adorna Properties Sdn Bhd* was clearly distinguishable from the facts of this case. The learned judge misdirected himself in not holding for the appellants on this ground. The appellant's case must succeed because the vendors had no title to pass. And the only exception is in favour of a bona fide purchaser for value. In this case, the evidence
- B conclusively pointed against the respondent on this issue. The burden of proving that he was a bona fide purchaser lay on the respondent and he plainly failed to discharge it (see para 17); *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241 distinguished.

C **[Bahasa Malaysia summary]**

- Plaintif-plaintif sebelum ini merupakan tuan punya berdaftar tanah tersebut. Pada 17 September 1997, mereka mendapat tahu bahawa tanah tersebut telah dipindahmilik kepada defendan pertama melalui pendaftaran memorandum pindahan dalam Borang 14A pada 9 Oktober 1996. Plaintif-plaintif telah
- D menegaskan bahawa mereka tidak pernah memasuki apa-apa perjanjian atau menandatangani apa-apa dokumen untuk memindahmilik tanah tersebut kepada defendan pertama. Dua penyangak yang mendakwa diri mereka tuan punya tanah tersebut telah memasuki satu perjanjian jualbeli tanah tersebut dengan defendan pertama. Ini berlaku pada 9 Mei 1996. Justeru itu, pada 18 September 1997
- E plaintif-plaintif telah membuat laporan polis menyatakan bahawa pindahmilik tanah tersebut kepada defendan pertama adalah palsu. Mereka kemudiannya memulakan tindakan ini terhadap defendan pertama. Defendan pertama dalam pembelaannya menegaskan bahawa beliau merupakan pembeli bona fide tanah tersebut untuk balasan bernilai menurut peruntukan s 340(3) Kanun Tanah Negara 1965 ('Kanun
- F tersebut') dan oleh demikian telah memperoleh hak milik yang tidak boleh disangkal ke atas tanah tersebut. Defendan pertama, sebagai satu tindakan untuk melindungi kedudukan mereka, telah memfailkan satu notis pihak ketiga terhadap defendan-defendan kedua dan ketiga untuk ganti rugi atau indemniti. Beliau mengatakan bahawa defendan-defendan kedua dan ketiga cuai. Defendan-defendan kedua dan ketiga pada masa matan merupakan rakan kongsi
- G dalam firma guaman yang bertindak bagi pihak defendan pertama untuk pembelian dan seterusnya pemindahmilikan tanah tersebut. Defendan-defendan kedua dan ketiga telah menafikan apa-apa kecuai di pihak mereka. Mereka juga, sebagai satu tindakan untuk melindungi kedudukan mereka, telah memasukkan Pentadbir Tanah Daerah Johor Bahru ('defendan keempat') sebagai pihak keempat kepada tindakan ini, menuntut sumbangan atau indemniti. Mereka sebaliknya mengatakan bahawa defendan keempat telah cuai. Pada 26 Ogos 2005, hakim perbicaraan yang bijaksana selepas perbicaraan penuh, telah menolak tuntutan plaintif-plaintif. Beliau mendapati bahawa hakikatnya alat pindahmilik tanah tersebut kepada defendan pertama adalah satu dokumen palsu. Meskipun begitu, dengan menggunakan kes Mahkamah Persekutuan *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241 ('Adorna Properties Sdn Bhd') beliau memutuskan bahawa defendan pertama adalah pembeli bona fide untuk suatu nilai menurut peruntukan s 340(3) Kanun tersebut dan oleh itu telah memperoleh hak milik yang tidak boleh disangkal ke atas tanah tersebut. Salah satu persoalan utama yang ditimbulkan oleh plaintif-plaintif dalam rayuan ini adalah bahawa hakim perbicaraan
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yang bijaksana telah terkhilaf apabila bergantung kepada kes *Adorna Properties Sdn Bhd*. Peguam bijaksana bagi pihak plaintif-plaintif telah berhujah bahawa *Adorna Properties Sdn Bhd* telah diputuskan per incuriam dan tidak patut diikuti. Oleh itu, apa yang perlu diputuskan adalah sama ada hakim perbicaraan yang bijaksana adalah betul dalam memutuskan bahawa defendan pertama merupakan pembeli bona fide tanah tersebut untuk balasan yang bernilai agar terangkum di bawah pengecualian yang boleh disangkal di bawah s 340(3) Kanun tersebut. Peguam bijaksana bagi pihak defendan pertama, berhujah bahawa penemuan-penemuan hakim perbicaraan yang bijaksana merupakan penemuan fakta dan mahkamah ini, sebagai mahkamah rayuan, tidak sepatutnya campur tangan dalam penemuan sedemikian.

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Diputuskan, membenarkan rayuan plaitnif-plaintif:

- (1) (oleh **Raus HMR; Hasan HMR** bersetuju) Mahkamah Persekutuan sepatutnya mengkaji semula keputusannya dalam *Adorna Properties Sdn Bhd*. Menurut s 340(2)(b) Kanun tersebut, hak milik *Adorna Properties* boleh disangkal kerana pendaftaran telah dilakukan secara palsu. Seksyen 340(3) tidak terpakai kepada s 340(2). Proviso menyatakan 'Provided that in this subsection' dan dalam subseksyen ini merujuk kepada s 340(3) dan bukan s 340(2). Seksyen 340(3)(a) merujuk kepada 'to whom it may subsequently be transferred' yang bermaksud pembeli yang berhasrat adalah pembeli seterusnya dan bukan pembeli secara langsung itu. Begitu juga, dalam kes ini, hak milik defendan pertama boleh disangkal kerana pendaftaran telah dilakukan secara palsu. Responden pertama adalah pembeli secara langsung dan bukan pembeli seterusnya, Seksyen 340(3) tidak digunapakai kerana ia merujuk kepada pembeli seterusnya dan bukan pembeli secara langsung. Oleh itu, plaintif-plaintif mungkin telah berjaya dalam rayuan ini jika bukan kerana tafsiran Mahkamah Persekutuan terhadap s 340 Kanun tersebut dalam *Adorna Properties Sdn Bhd*. Namun mahkamah ini belum bersedia untuk tidak mengendahkan atau tidak mengambilkira keputusan dalam *Adorna Properties Sdn Bhd* (lihat perenggan 34–35); *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241 diikuti.

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- (2) (oleh **Raus HMR; Hasan HMR** bersetuju) Penemuan hakim perbicaraan yang bijaksana bukan semata-mata berkaitan persoalan tentang fakta. Ia merupakan gabungan persoalan fakta dan undang-undang. Oleh itu, meskipun penemuan hakim perbicaraan yang bijaksana adalah alasan berdasarkan fakta ia tidak membebaskan mahkamah ini daripada melaksanakan tanggungjawabnya sebagai mahkamah rayuan (lihat perenggan 38).

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- (3) (oleh **Raus HMR; Hasan HMR** bersetuju) Kewujudan satu perjanjian jualbeli dan bayaran penuh untuk harga belian bukan hanya petunjuk untuk menunjukkan sama ada seseorang itu adalah pembeli bona fide atau sebaliknya. Ciri-ciri penting lain berkaitan perjanjian jualbeli tersebut juga hendaklah diambilkira (lihat perenggan 41). Dalam kes semasa, sekiranya hakim perbicaraan yang bijaksana telah mengambilkira fakta-fakta dan keadaan lain, beliau tidak mungkin membuat kesimpulan bahawa defendan adalah pembeli bona fide untuk balasan yang bernilai, yang mendapat perlindungan di bawah s 340(3) Kanun tersebut. Defendan pertama telah

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- A membuat jualan tanpa sebarang siasatan yang sempurna terhadap hak milik atau mereka yang telah mendakwa sebagai tuan punya. Tidak diragukan beliau mempunyai hak untuk mengambil peluang terhadap harga murah yang telah ditawarkan kepadanya tetapi beliau telah mengambil risiko. Apabila beliau mengambil risiko sedemikian, ia tidak patut dilakukan sehingga menjejaskan
- B plaintif-plaintif. Dalam keadaan sedemikian mahkamah tidak sepatutnya menyalahbeli defendan pertama dan bukan plaintif-plaintif. Untuk berbuat demikian, adalah tidak berlaku adil terhadap plaintif-plaintif (lihat perenggan 42). Bahkan, sekiranya keterangan dikemukakan dalam kes ini telah
- C dipertimbangkan dengan sewajarnya dan dinilai oleh hakim perbicaraan yang bijaksana, satu inferens yang munasabah adalah bahawa defendan pertama mengetahui pada masa beliau membeli tanah tersebut, harga belian adalah di bawah nilai pasaran. Namun beliau ingin mengambil kesempatan ke atas harga rendah itu. Beliau dengan pantas telah menyelesaikan belian itu, Dengan berbuat demikian beliau tidak menghiraukan tanggungjawabnya untuk menyiasat tuan punya yang dikatakan itu dan keaslian dokumen
- D tersebut. Seorang pembeli berniat baik tidak termasuklah seorang pembeli yang kurang berhati-hati atau yang telah cuai (lihat perenggan 43).
- E (4) (oleh **Raus HMR; Hasan HMR** bersetuju) Defendan pertama di bawah satu tanggungjawab untuk menyiasat dengan betul semua perkara berkaitan jualan tanah tersebut dan tidak sepatutnya menerima secara membuta tuli apa yang didakwa oleh 'vendors' sebagai betul dan asli. Apabila beliau gagal untuk mengambil langkah-langkah berjaga-jaga biasa yang sepatutnya diambil dalam perkara sebegini beliau tidak berhak mendapat perlindungan mahkamah (lihat perenggan 44).
- F (5) (oleh **Raus HMR; Hasan HMR** bersetuju) Memandangkan defendan pertama bergantung kepada proviso s 340(3) Kanun tersebut, bahawa beliau seorang pembeli bona fide untuk balasan bernilai, beban pembuktian terletak ke atasnya. Beban pembuktian kekal dengan defendan pertama. Tiada kewajiban ke atas plaintif-plaintif untuk membuktikan bahawa defendan pertama adalah satu pihak atau privy kepada fraud atau pemalsuan itu (lihat perenggan 45).
- G (6) (oleh **Raus HMR; Hasan HMR** bersetuju) Tiada liabiliti dapat dikaitkan terhadap defendan-defendan kedua dan ketiga. Defendan pertama tidak mengemukakan sebarang keterangan semasa perbicaraan untuk menyokong pengatahan bahawa defendan-defendan kedua dan ketiga berlaku cuai. Tambahan pula berdasarkan keadaan transaksi ia jelas menunjukkan bahawa
- H defendan pertama telah mengambil keputusan komersial untuk membeli tanah tersebut yang beliau akui satu tawaran yang baik. Dalam satu hari sahaja, beliau telah melawat tanah tersebut, memutuskan untuk membelinya dan bersetuju terhadap terma jualan termasuklah bayaran pendahuluan 80% daripada harga belian secara tunai. Ini telah dilakukan sebelum defendan pertama menasihati defendan kedua. Defendan kedua dalam keterangannya menyatakan bahawa apabila defendan pertama berjumpa dengannya, beliau memaklumkan (defendan pertama) tentang risiko itu. Namun menurut
- I defendan kedua, defendan pertama yang merupakan pelanggan tetap dan tahu benar tentang julbeli hartanah, ingin meneruskan transaksi tersebut dan

dengan segera. Defendan kedua kemudiannya memberi keterangan bahawa arahan yang diberikan kepadanya untuk menyediakan terma-terma yang telahpun dipersetujui. Sememangnya, di bawah keadaan sedemikian defendan-defendan kedua dan ketiga tidak patut dipersalahkan. Sewajarnya tuntutan defendan pertama terhadap defendan-defendan kedua dan ketiga ditolak (lihat perenggan 47).

- (7) (oleh **Gopal Sri Ram HMR**) Keputusan dalam *Adorna Properties Sdn Bhd* tidak boleh dianggap sebagai duluan yang mengikat kerana ia telah diputuskan per incuriam (lihat perenggan 13). Ia adalah tunjang kepada doktrin ketidakbolehsangkalan yang termaktub dalam s 340 bahawa surat ikatan dokumen hak milik dengan sendirinya mestilah asli. Dalam *Adorna Properties Sdn Bhd*, alat pindahmilik dan dokumen-dokumen lain telah dipalsukan. Namun hak milik adalah asli. Dalam rayuan semasa terdapat bukti yang meyakinkan untuk menunjukkan bahawa surat ikatan hak milik yang digunakan untuk melakukan transaksi di sini dengan sendirinya satu pemalsuan. Justeru itu *Adorna Properties Sdn Bhd* dengan jelas berbeza daripada fakta-fakta kes ini. Hakim bijaksana telah salah arah apabila tidak memutuskan bagi pihak perayu-perayu atas alasan ini. Kes perayu seharusnya berjaya kerana penjual tiada hak milik untuk dipindahkan. Dan satu-satu pengecualian adalah menyebelahi pembeli bona fide untuk suatu nilai. Dalam kes ini, keterangan secara konklusifnya menunjukkan terhadap responden tentang persoalan ini. Beban pembuktian adalah bahawa beliau merupakan pembeli bona fide terletak ke atas responden dan beliau dengan nyata telah gagal melepaskannya (lihat perenggan 17); *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241 dibeza.]

Notes

For cases on forged transfer, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2923–2928.

Cases referred to

- Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241 (distd)
Bhup Narain Singh v Gokhul Chand Mahton LR 61 IA 115 (refd)
Bissonauth v The Sugar Fund Insurance Bond [2007] UKPC 17 (refd)
Boonsom Boonyanit v Adorna Properties Sdn Bhd [1995] 2 MLJ 863 (refd)
Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62 (refd)
Brennan v Comcare [1994] 122 ALR 615 (refd)
Carter v Bradbeer [1975] 1 WLR 1204 (refd)
Coghlan v Cumberland [1898] 1 Ch 704 (refd)
Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293 (refd)
Donoghue v Stevenson [1932] AC 562 (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1 (refd)
Kesarmal & Anor v Valliappa Chettiar [1954] MLJ 119 (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 (refd)
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1 (refd)
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (refd)

- A** *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53 (refd)
Muthammah v Masri Mohamed [2000] 5 MLJ 518 (refd)
Oliver v Hinton [1899] Chancery Division 264 (refd)
Pesuruhjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors [1971] 2 MLJ 30 (refd)
- B** *Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors* [2005] 6 MLJ 120 (refd)
Teh Bee v Maruthamuthu [1977] 2 MLJ 7 (refd)
'The Boucraa' [1994] 1 All ER 20 (refd)
Winterbottom v Wright [1842] 152 ER 402 (refd)
- C** **Legislation referred to**
National Land Code ss 5, 340(1), (2)(b), (3)

Appeal from: Civil Suit No 22–155 of 1998(1) (High Court, Johor Bahru)

- D** *Ng Chew Hor (Ng Fan & Assoc) for the appellants.*
Wong Kim Fatt (J Jayaperakash & Wong Boon Lee with him) (Tam Cheng Yau & Co & M/s Anandan Krishnan & Partner) for the first respondent.
George Neo (YH Ngu with him) (Yeo, Tan, Hoon & Tee) for the second and third respondents.
- E** *Abdul Rashid Sudin (State Johor Legal Advisor) for the fourth respondent.*

Gopal Sri Ram JCA:

- F** [1] I have had the advantage of reading the judgment of my learned brother Raus Sharif in draft and agree with the conclusion he has arrived at and the orders he proposes to make in this appeal. However I wish to give my own reasons in addition to those already given by my learned brother. The first has to do with the value of *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241 as binding precedent. The second is this. Even if the decision in *Adorna Properties* is good law,
- G** does what was there held apply to the facts of this case? In order to deal with the first point, it is necessary to hearken to the statutory scheme which creates indefeasibility of title to land.
- H** [2] Let me take the first point. I begin with the concept of a binding precedent. In the hierarchy of a common law system of judicature, it is a general rule that the decisions of a higher court are binding on all courts below it. So, the decisions of an apex court are binding upon all courts below it. This practice of following the decisions of a higher court is often referred to as the doctrine of binding precedent or of stare decisis. Its object is to ensure certainty in the law. But then there are precedents and there are precedents. Some decisions of the highest court lay down a principle of common law that alters the position that obtained earlier. For example,
- I** until *Donoghue v Stevenson* [1932] AC 562, the common law did not recognise that the manufacturer of a product owed a duty of care to the ultimate consumer. See, *Winterbottom v Wright* [1842] 152 ER 402. But the House of Lords in *Donoghue v Stevenson* altered that position. Such a decision is, of course, binding because it

established a new principle of law. This is an example of a true precedent. But where you have a case which involves the interpretation of a section in an Act of Parliament the doctrine of precedent has a lesser effect. See, *Carter v Bradbeer* [1975] 1 WLR 1204, per Lord Diplock.

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[3] Gummow J explained the difference between the interpretation of a statute and that of a judgment of a court in *Brennan v Comcare* [1994] 122 ALR 615 as follows:

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The judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law. In the latter class of case, the task is to interpret the legal concepts which find expression in the various language used in the relevant judgments. The frequently repeated caution is against construing the terms of those judgments as if they were the words of a statute. The concern is not with the ascertainment of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding of the concepts to which expression was sought to be given.

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The distinction is usefully expressed in the following passage from Judge Posner's work *The Problems of Jurisprudence*, 1990, p 248:

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Translation may be imperfect and alter the meaning of the original doctrine; nevertheless many common law doctrines have a stable meaning, though expressed in a variety of different ways. We are not afraid that we would lose the meaning, of negligence if we put it in different words from those used by learned hand, or William Prosser, or some other authoritative expositor of the concept.

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Statutory law differs in that the statutory text the starting point for decision, and in that respect (but only that respect) corresponding to judicial opinions in common law decision making — is in some important sense not to be revised by the judges, not to be put into their own words. They cannot treat the statute as a stab at formulating a concept. They have first to extract the concept from the statute — that is, interpret the statute. (There is a sense in which common law judges 'interpret' common law, but it is the sense in which 'interpretation' means 'understanding'.)

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[4] It is important to recognise that the Federal Court in *Adorna Properties* was not laying down any new principle of the common law. It was merely interpreting a section in a statute. If it can therefore be demonstrated that *Adorna Properties* was decided per incuriam, no court in this country need follow it. As Sir John Salmond said in his *Treatise on Jurisprudence* (12th Ed) at pp 151–215:

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A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute, ie, delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in the leading case (*London Street Tramways v LCC* [1898] AC 375) and for the Court of Appeal it was given as the leading example of a decision per incuriam which would not be binding on the court (*Young v Bristol Aeroplane Co Ltd* (194) KR at p 729 (CA)). The rule apparently applies even though the earlier court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of the statute. Similarly, a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such incuria as to vitiate the decision. *Even a lower court can impugn a precedent on such grounds.* (Emphasis added.)

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A [5] Before I comment on *Adorna Properties* let me begin with s 340 of the Code. It has been set out in full by my learned brother in his judgment. For that reason I will merely refer to but not reproduce it. In its first subsection it protects 'the person for the time being registered as proprietor' of land against impeachment of his or her title. The phrase 'for the time being' identifies the point of time at which

B indefeasibility of proprietorship is to be ascertained, namely, when action is filed to impeach the registered proprietor's title. In general terms what s 340(1) amounts to is this. If your name appears on the register document of title then you are the owner of the land as against the whole world. As Abdul Malik Ishak J put it in *Muthammah v Masri Mohamed* [2000] 5 MLJ 518:

C It is now trite law that upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land (s 340(1) of the National Land Code 1965). The phrase 'indefeasible title' means a title or an interest which is free of all adverse claims or encumbrances not noted in the register. It is quite obvious that the effect of registration is to defeat all prior unregistered claims.

D [6] The other side of the same coin is this. Even if the registered proprietor acquired his title unlawfully, that is to say, in breach of written law, he may nevertheless assert it against the whole world until proceedings are brought to remove him from the register. And that is really the effect of s 340(1) of the Code. The decision of the former Federal Court in *Teh Bee v Maruthamuthu* [1977] 2 MLJ 7 exemplifies the proposition.

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[7] In that case, the defendant was in occupation of certain land of which the plaintiff was the registered proprietor. He had been there for a very long time — since 1952. He occupied it by virtue of a temporary occupation licence which had been issued to him by the appropriate authority. The plaintiff had obtained registration of her title in breach of the express provisions of the Code which the State Authority had failed to observe. The plaintiff brought an action against the defendant in the magistrate's court for vacant possession. In his defence, the defendant denied that the plaintiff was the registered proprietor of the land. He said that the State Authority had acted unlawfully in issuing the title to the plaintiff. He also said that the plaintiff's title was invalid because it had been obtained by fraud, misrepresentation and by unlawful means. He however did not file an action against the plaintiff and the State Authority claiming a declaration of invalidity and consequential orders. There was simply no frontal attack on the plaintiff's title. This proved fatal. Because, what remained was only the issue whether the plaintiff's name appeared on the register. It did. And on that ground she was entitled to succeed. As Ali Acting CJ (Malaya) said:

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I There is also another much more important reason why this appeal should be allowed. Under the Torrens System the register is everything. ... In *Creelman & Anor v Hudson Bay Insurance Company* [1920] AC 194 which was an appeal from British Columbia, Lord Buckmaster delivering the judgment of the Judicial Committee said on page 197:

Their Lordships are unable to accede to either of these propositions. In their opinion the certificate of title referred to in section 22 of the Land Registry Act is a certificate which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept. And to enable an investigation to take place as to the right

of the person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the statute of registration.

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[8] Let me re-emphasise that *Maruthamuthu's* case was decided in the way it was because there was no attack on the plaintiff's title. The defendant merely attempted to defend himself by relying on the unlawful way in which the plaintiff had acquired her title. That is insufficient. Absent direct and frontal attack upon the title of a registered proprietor s 340(1) insulates him completely.

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[9] I now turn to s 340(2). This carves out three circumstances in which the title of 'the person for the time being registered as proprietor' 'shall not be indefeasible'. In *Kesarmal & Anor v Valliappa Chettiar* [1954] MLJ 119, the Privy Council held that the latter phrase means 'that the title of a proprietor is liable to be defeated'. A registered proprietor's title is — to use the words of the Judicial Committee — 'liable to be defeated' only in an action brought for that purpose. In other words, there cannot be a collateral attack upon a registered title. This reinforces the point I made earlier in this judgment. It follows that s 340(2) qualifies s 340(1) to afford a registered proprietor interim protection of his or her title. Put differently, the title of a registered proprietor remains indefeasible until it is successfully impeached in proceedings properly brought for that purpose by a person having locus standi to bring an action. Let me illustrate. V is the registered proprietor of Blackacre and holds the issue document of title. R, pretending to be V obtains a duplicate issue document to Blackacre. R then transfers Blackacre to P for valuable consideration. P is innocent. P would acquire a title to Blackacre that is indefeasible against the whole world except V or any person claiming through or under V. So, if P brings an action for ejectment against T, a trespasser on Blackacre, T cannot resist those proceedings by alleging that P's title is defeasible because of the forgery. Neither will T succeed in an action to impeach P's title because he lacks standing. However, P's title remains defeasible as against V and V may bring an action to recover Blackacre from P.

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[10] But what if P transfers Blackacre to X? Can V recover his land from X? The answer to this question is provided by s 40(3). The subsection makes plain that the title remains defeasible in the hands of subsequent acquirers — X in the example given — or indeed anyone X may transfer Blackacre to. This is because it uses the expression 'may subsequently be transferred'. But, as a matter of policy, a line must be drawn beyond which the title to Blackacre must be put beyond the reach of V. And the Code in the proviso to s 340(3) draws that line at the door of a purchaser who acquires title from a registered proprietor in good faith and for valuable consideration. So in the example provided, if X acquired Blackacre from P or took a charge or lease of it from P in good faith and for valuable consideration, then X will obtain a title that is indefeasible even as against V. Since the proviso applies only to a subsequent purchaser it cannot and does not apply to P.

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[11] I now turn to *Adorna Properties Sdn Bhd v Boonsom Boonyanit* where the facts were these. The plaintiff, Boonsom was the owner of a valuable piece of land. The original title to her land was in her possession. A rogue, pretending to be the

- A plaintiff, obtained a duplicate of the title. The plaintiff's land was then sold and transferred to the defendant by means of forged documents. The plaintiff brought an action to recover her land. She had been the registered proprietor. She had been deprived of her proprietorship by a forgery. And the defendant had got itself onto the register by means of a forged instrument. Its title was therefore defeasible. Yet the plaintiff failed. Because the Federal Court read the proviso to sub-s (3) as qualifying sub-s (2) by equating the expressions 'registered proprietor' and 'purchaser' both of which appear in s 340.

- C [12] In my judgment, the decision in *Adorna Properties* is not to be treated as binding precedent because it was decided per incuriam. There are three reasons for this. First, it is plain as a pike staff that s 340(3) applies to subsequent acquirers of land, taking from a registered proprietor whose title is defeasible in the sense I have discussed earlier in this judgment. *Adorna* was not a subsequent purchaser. It took its title from the forger. The Federal Court therefore overlooked the critical words 'to whom it may subsequently be transferred' appearing in s 340(3). Second, the Federal Court in *Adorna Properties* when arriving at its decision overlooked at least two authorities which hold that the Code provides for deferred indefeasibility. In *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53, Hashim Yeop A Sani J (later CJ (Malaya)) said this (at p 54):

- E What the appellant is claiming is in fact the protection of section 340 of the National Land Code. The doctrine carried in section 340 is the doctrine of indefeasibility. What that section protects is that the title or interest of any person for the time being registered as proprietor of any land shall be indefeasible. Subsection (2) of the section provides for the exceptions in that the title or interest shall not be indefeasible in any case of fraud or misrepresentation or where registration was obtained by forgery or by means of an insufficient or void instrument or where the title or interest was unlawfully acquired.
- F *This provision deals with what is called 'deferred indefeasibility' about which we are not presently concerned. (Emphasis added.)*

- G Then there is the judgment of the Supreme Court, the immediate precursor of the Federal Court in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294. In that case, Wan Yahya SCJ said (at p 309):

- H In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility — see *Gibbs v Messer* [1891] AC 248. Under this principle, the registration of the insufficient or void instrument can be set aside.

- I Neither of these authorities were cited by the Federal Court in its judgment. Nor was any reason given why the judgment of Hashim Yeop A Sani J in *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53, which was quoted in the judgment of this court was wrong and ought not to be followed.

- I [13] Third, *Adorna Properties*, as I have already said, equated purchasers and registered proprietors. Here is the passage in which it did that (at p 246):

The proviso to sub-s (3) of s 340 of the NLC deals with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s (3)

this category of registered proprietors so that these proprietors are not caught by the main provision of this subsection. Who are these proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s (3). For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document.

In so doing, the Federal Court clearly overlooked the provisions of s 5 of the Code which defines them separately and differently as follows:

‘proprietor’ means any person or body for the time being registered as the proprietor of any alienated land;

‘purchaser’ means a person or body who in good faith and for valuable consideration acquires title to, or any interest in land.

Accordingly, the decision in *Adorna Properties*, to use the words of Sir John Salmond in the passage already quoted, ‘was rendered in ignorance’ of a statutory provision and as such cannot be treated as binding precedent.

[14] There is a further point that needs to be made. The object and purpose of s 340 is to protect registered proprietors of land by affording them certainty of title. This is a just result because it is unfair and unjust that the true owner of land should be deprived of it by the machinations of a rogue. When a court interprets a statute, particularly one which confers rights upon or grants protection to persons generally or a class, its duty is to derive a meaning that is fair, or in accordance with the purpose of the particular Act of Parliament. Put differently, an interpretation should not be placed which will produce an unsatisfactory or unfair result. Indeed, there is a presumption that Parliament does not intend an unfair or unjust result. See, *Pesuruhjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30; ‘*The Boucraa*’ [1994] 1 All ER 20; *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1. This is the approach that the Privy Council adopted in the very recent case of *Bissonauth v The Sugar Fund Insurance Bond* [2007] UKPC 17 (decided on 19 March 2007). In the advice of the board, delivered by Lord Neuberger of Abbotsbury, you will see several references to the criteria of fairness and justice when interpreting the statute that fell for consideration in that case. Now, as may be seen from what I have said thus far, *Adorna Properties* interpreted s 340 in a manner as to produce an unfair and unjust result. This is an added reason why *Adorna Properties* should not be followed.

[15] It is no exaggeration to say that *Adorna Properties* has wreaked havoc in the law of real property. All you have to do is to read our national newspapers. You will find news stories of innocent landowners who have found themselves deprived of their land by forged instruments of dealing. There is no question that law as it stands today favours forgers. In *Subramaniam all NS Dhurai v Sandrakasan all Retnasamy & Ors* [2005] 6 MLJ 120, I summed up the effect of *Adorna Properties* as follows (at p 128):

As a registered proprietor you can cling on to your issue document of title for dear life. Yet a rogue may by the use of forged documents obtain a duplicate of the issue document of title claiming the original to be lost and sell and transfer your land to a perfectly innocent purchaser. That is what happened in the *Boonsom Boonyanit* case. Yet, according to the judgment of the Federal Court, you cannot recover your property.

- A** [16] I am therefore prepared to hold for the appellants for the reasons already advanced. However, even if *Adorna Properties* is binding (which I say it is not), then I turn to the second question: does it apply to the facts of the present instance to protect the first respondent?
- B** [17] It is central to the doctrine of indefeasibility housed in s 340 that the issue document of title must itself be genuine. In *Adorna Properties*, the instrument of transfer and other attendant documents were forged. But the title was genuine. In the present appeal I accept the submission of learned counsel for the appellant that there is cogent evidence going to show that the issue document of title used to effect the transaction here was itself a forgery. Hence *Adorna Properties* is clearly distinguishable from the facts of this case. In my judgment the learned judge misdirected himself in not holding for the appellants on this ground. The appellant's case must succeed because the vendors had no title to pass. You cannot give what you do not have — *nemo dat quod non habet*. And the only exception is in favour of a bona fide purchaser for value. See, *M & J Frozen Food*. As my learned brother Raus Sharif has demonstrated in his judgment, the evidence conclusively points against the respondent on this issue. The burden of proving that he is a bona fide purchaser lay on the respondent (*Bhup Narain Singh v Gokhul Chand Mahron* R 61 IA 115) and he plainly failed to discharge it.
- E** **Raus Sharif JCA:**
- [18] This is an appeal against the decision of the High Court Johor Bahru which dismissed the plaintiffs' claim against the first defendant with costs. The plaintiffs had in their statement of claim sought for the following reliefs:
- F** (a) a declaration that they are the beneficial and legal owners of land held under Geran Mukim No 312 Mukim Pulau, in the State of Johor ('the said land');
- (b) a declaration that the transfer of the said land to the first defendant was void;
- (c) an order that the endorsement of the transfer on the issue document of title of the said land be cancelled and the land administrator, do effect the necessary cancellation;
- G** (d) general damages; and
- (e) interest and costs.
- H** [19] The plaintiffs, Au Meng Nam and Au Ming Kong, were previously the registered proprietors of the said land. On 17 September 1997, they came to know that the said land had been transferred to the first defendant, Ung Yak Chew vide the registration of the memorandum of transfer in Form 14A on 9 October 1996.
- I** [20] The plaintiffs contended that they had never entered into any agreement or signed any document to transfer of the said land to the first defendant. What happened was, two rogues claimed to be the proprietors of the said land entered into a sales and purchase agreement of the said land with the first defendant. This took place on 9 May 1996.

[21] Hence, on 18 September 1997 the plaintiffs lodged a police report stating that the transfer of the said land to the first defendant was fraudulent. They subsequently brought this action against the first defendant.

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[22] The first defendant in his defence contended that he was a bona fide purchaser of the said land for valuable consideration within the proviso to s 340(3) of the Code and thus had obtained an indefeasible title to the said land. The first defendant, as a fall back position, filed a third party notice against Lau Kok Guan ('second defendant') and Chuah Chong Ying ('third defendant') for compensation or indemnity. He alleged that the second and third defendants were negligent.

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[23] The second and third defendants were at the material time, the partners of Messrs Lau Kok Guan & Partners, the firm of solicitors acting for the first defendant for the purchase and subsequent transfer of the said land. The second and third defendants denied of any negligence on their part. They too, as a fall back position, brought in the Pentadbir Tanah Daerah Johor Bahru ('the fourth defendant') as the fourth party to this action, claiming for contribution or indemnity. They in turn alleged that the fourth defendant was negligent.

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[24] On 26 August 2005, the learned trial judge after a full trial, dismissed the plaintiffs' claim. He found it as a fact that the instrument of transfer of the said land to the first defendant was a forged document. Nevertheless, applying the Federal Court case of *Adorna Properties* he held that the first defendant was a bona fide purchaser for value within the proviso to s 340(3) of the Code and thus had acquired an indefeasible title to the said land.

E

[25] One of the main issues raised by the plaintiffs in this appeal was that the learned trial judge was wrong to rely on the case of *Adorna Properties*. Mr Ng Chew Hor, learned counsel for the plaintiffs submitted that *Adorna Properties* was decided per incuriam and should not be followed.

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[26] It is therefore necessary to undertake a careful examination of *Adorna Properties*. The facts of that case are these. Mrs Boonsom Boonyanit was a Thai national. She owned two pieces of land in Tanjong Bungah, Penang. A rogue forged her signature, sold and subsequently transferred her two pieces of land to Adorna Properties. She discovered the fraud only after Adorna Properties was registered as the owner of the two pieces of land. She brought an action against Adorna Properties in order to have her name restored on the register as the owner of the property.

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[27] During the trial, Adorna Properties argued that as an innocent third party purchaser for value, its title was indefeasible notwithstanding the forged signature on the memorandum of transfer and relied on s 340 of the Code. Section 340 reads as follows:

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- (1) The title or interest of any person or body for the time being registered as proprietors of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
- (2) The title or interest of any such person or body shall not be indefeasible:

- A** (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy, or;
- (b) where registration was obtained by forgery, or by means of an insufficient or void instrument;
- (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
- B** (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2):
- (a) it shall be liable to be set-aside in the hands of any person or body to whom it may subsequently be transferred; and
- C** (b) any interest subsequently granted thereout shall be liable to be set-aside in the hands of any person or body in whom it is for the time being vested:
- Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body, claiming through or under such a purchaser.
- D** (4) Nothing in this section shall prejudice or prevent:
- (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any written law for the time being in force, or any power of avoidance conferred by any such law, or
- E** (b) the determination of any title or interest by operation of law.

F [28] The High Court in interpreting the above provisions held that even if the instrument of transfer was forged, Adorna Properties had nevertheless acquired indefeasible title over the property by virtue of s 340(3) of the Code, which protects any title or interest acquired by any purchaser in good faith and for valuable consideration (see *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1995] 2 MLJ 863). Hence, the High Court ruled in favour of Adorna Properties.

G [29] The Court of Appeal interpreted the above provisions differently (see *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62). The Court of Appeal held that the words 'any purchaser' in s 340(3) of the Code refers to a subsequent and not to an immediate purchaser. My learned brother, Gopal Sri Ram JCA speaking for the Court of Appeal held (at pp 85–86):

H ... the words 'any purchaser' appearing in the proviso to s 340 (3) do not include a registered proprietor whose immediate title is rendered defeasible by one or more of the vitiating elements specified in the second sub-s to s 340 of the Code. Any other construction would, in our view, denude sub-s (2) of all effect. The section should be read as making defeasible the title of a proprietor who gets onto the register by means of one or more of the methods specified in the second subsection. However, if such a registered proprietor were to dispose of the land to a third party who, in good faith, pays the purchase price, then, the latter, as well as all those who come onto the register after him, take title free of any taint.

I

[30] Accordingly, the Court of Appeal decided in favour of Mrs Boonsom Boonyanit. However the Federal Court overruled the decision of the Court of Appeal. Eusoff Chin CJ reasoned as follows (at p 246):

The proviso to sub-s (3) of s 340 of the NLC deals with only class or category of registered proprietors for the time being. It excludes from the main provisions of sub-s (3) this category of registered proprietors so that these proprietors are not caught by main provision of this subsection. Who are these proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provisions of sub-s (3). For this category of registered proprietors, they obtained immediately indefeasibility notwithstanding that they acquired their titles under a forged document.

We therefore, agree with the High Court judge that, on the facts of this case, even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to the said land.

[31] Much criticism had been levelled against the Federal Court's decision in *Adorna Properties*. To some, the Federal Court's decision was plainly wrong and should be disregarded (see *Subramaniam all NS Dhurai v Sandrakasan all Retnasamy & Ors* [2005] 6 MLJ 120). Associate Professor Teo Keang Sood of the Faculty of Law, National University of Singapore in an article 'Demise of Deferred Indefeasibility Under the Malaysia Torrens System?' (Singapore Journal of Legal Studies, 2002, pp 403-408) writes:

Having misconstrued the legislative intent as embodied in section 340, the case of *Adorna Properties* is clearly wrongly decided on the issue of indefeasibility involving forgery and should not be followed. Whatever may be the advantages of immediate indefeasibility, it is for Parliament, to change the law, and until that is done, it is for the courts to interpret the law as it stands.

[32] The learned trial judge did not heed to the call of Professor Teo. I can understand the learned trial judge's reluctance to depart from the Federal Court's decision. I join his view. To depart would be to go against the doctrine of stare decisis. Speaking on the subject of doctrine of stare decisis Steve Shim CJ (Sabah & Sarawak) in *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293 said (at p 297):

It is axiomatic to state that the doctrine of stare decisis has become the cornerstone of the common law system practiced in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability.

His Lordship further stated that:

Judicial hierarchy must be observed in the interest of finality and certainty in the law and for orderly development of legal rules as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system.

[33] Abdul Hamid Mohammad FCJ in the same case speaking on the same subject said (at p 300):

... judgments of the Federal Court, are binding on the Court of Appeal. Whether the Court of Appeal agrees with them or not, it is incumbent upon it to apply the test. However, if the court thinks that it has good reasons for disagreeing with the judgments, it may, while following them, point out why they should be reviewed by this court. Until it is actually done by this court, they remain binding on the Court of Appeal.

- A [34] Taking the cue from the above observation of Abdul Hamid Mohammad FCJ, it is my respectful view that the Federal Court should review its decision in *Adorna Properties*. To me, by virtue of s 340(2)(b) of the Code, the title of Adorna Properties was not indefeasible as the registration was obtained by forgery. Section 340(3) does not apply to s 340(2). The proviso states 'Provided that in this subsection' and this
- B subsection refers to s 340(3) and not s 340(2). Section 340(3)(a) refers to 'to whom it may subsequently be transferred' which means that the intended purchaser is the subsequent purchaser and not the immediate purchaser.
- C [35] Similarly, in the instant case, the title of the first defendant is defeasible as the registration was obtained by forgery. The first respondent was the immediate purchaser and not a subsequent purchaser. Section 340(3) has no application as it refers to subsequent purchaser and not the immediate purchaser. Thus, the plaintiffs would have succeeded in this appeal if not for the Federal Court interpretation of s 340 of the Code in *Adorna Properties*. But for the reasons given earlier, I am not ready to ignore or disregard the Federal Court's decision in *Adorna Properties*.
- D [36] Thus, what need to be decided now is whether the learned trial judge was right in holding that the first defendant was a bona fide purchaser of the said land for valuable consideration so as to fall within the exception to defeasibility under
- E s 340(3) of the Code. Mr Ng Chew Hor submitted that the learned trial judge had misdirected himself on the law and evidence adduced at the trial in holding that the first defendant was a bona fide purchaser. Mr Wong Kim Fatt, learned counsel for the first defendant, submitted otherwise. According to him, the findings of the learned trial judge were findings of facts and this court, as an appellate court, should be slow in interfering with such findings.
- F [37] With utmost respect and having read and re-read the judgment under appeal, I do not think that the findings of the learned trial judge turns solely on the question of fact. The learned trial judge in concluding that the first defendant was a bona fide purchaser said:
- G The question arises whether on the evidence presented herein the court can safely conclude that the defendant is not a bona fide purchaser for valuable consideration so as to fall within the exception to defeasibility as provided for by the proviso to section 340(3) of the National Land Code. To do so the evidential burden falls on the defendant and upon evaluating the evidence the defendant has on a balance of probabilities successfully discharged the burden.
- H I say so for the following reasons
- I 1 The sale and purchase agreement speaks for itself in that the defendant is the purchaser of the property in question who has given valuable consideration by payment of the full purchase price.
- 2 Though the consideration paid was below the Government Valuation of RM1.2m by the plaintiffs' valuer (SP2) nevertheless to my mind that by itself cannot negative the defendant's status as bona fide purchaser for valuable consideration bearing in mind that the plaintiffs has failed to adduce evidence that the defendant was privy to the fraud and/or forgery. The standard of proof for fraud is proof beyond reasonable doubt and for forgery on a balance of probabilities — see Federal Court decision in *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241 in approving *Saminathan v Pappa* [1981] 1 MLJ 121. The plaintiff's valuers report to my mind must be

approached with caution as it was prepared in 2001 — some five years after the transaction and there were glaring omissions as to the existence and effect of acquisition exercise by the relevant authorities on the said land in 1996 and the acknowledgement by SP2 that consideration need not be adequate as it could be nominal and sufficient. There is no dispute that the defendant paid the full ad valorem stamp based on the adjudicated government valuation of RM1.2m.

- 3 The evidence of the defendant that he is illiterate and hence had to engage and relied heavily on the advice of his solicitors ie, the third party herein in the purchase of the property which he felt he had a good bargain.
- 4 The corroborative evidence of TPWS-1 that he was handed the original title deeds of the property at his office by the vendors as stated therein and the defendant's testimony that he received the original title deed (P2) duly registered into his name from the third party.

[38] It is clear from the above that the findings of the learned trial judge do not solely turn on a question of fact. It was a mixed question of fact and law. Thus, the proposition by Mr Wong Kim Fatt was not entirely correct. I am also of the view that even if the findings of the learned trial judge was based on factual ground it does not absolve this court of doing its duty as an appellate court. Lindley MR in *Coghlan v Cumberland* [1898] 1 Ch 704 summed up that duty as follows:

Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross examined before the judge, the court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions: and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.

[39] In fact, this court in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97, formulated the following test warranting appellate intervention (at pp 116–117):

Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves.

A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept

- A** or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.
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- C** [40] On appeal, the Federal Court affirmed the approach taken by this court (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1. Steve Shim CJ (Sabah & Sarawak) who delivered the judgment of the court said (at pp 10–11):

- D** In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.
- E**

- F** In the circumstances and for the reasons stated, there is no merit in the appellants' contention that the Court of Appeal had adopted a new test for appellate intervention. In our view, what the Court of Appeal had done was merely to accentuate the established plainly wrong test consistently applied by the appellate courts in this country.

- G** [41] With the above in mind, I will now examine learned trial judge's reasoning in holding that the first defendant was a bona fide purchaser for valuable consideration. One of the reasons given was that the sale and purchase agreement speaks for itself. To the learned trial judge, the first defendant was a bona fide purchaser and had given valuable consideration because of the existence of the sale and purchase agreement and the purchase price had been paid in full. With respect such reasoning is seriously flawed. An existence of a sale and purchase agreement and the payment of the purchase price in full cannot be the only indicator to show whether a person is a bona fide purchaser or otherwise. Other salient features surrounding the sale and purchase agreement must be considered. In the present case, the learned trial judge failed to take into account the followings:
- H**

- I** (i) The completion date of the sale and purchase agreement was nine months from the date of signing. The purchase price was RM400,000. However, 80% of the purchase price was paid on the date of signing of the agreement, and the balance was paid three months after the date of signing.

- (ii) About three months after the purchase and the said land being registered under his name, the first defendant attempted to sell the said land for RM1,200,000. In the attempted sale, the said land was valued for stamping purposes for RM1,286,000. A
- (iii) Both the 'vendor' possessed only temporary identity cards when the sale and purchase agreement was signed. No queries or searches were made of the relevant authorities. B
- (iv) Admission by the second defendant, the solicitors acting for the first defendant, during cross examination that if given time, he would be able to write to the Jabatan Pendaftaran Negara, to find out the identity of the 'vendors' who came to his office, with temporary identity cards. However, he did not do so because the first defendant insisted in concluding the transaction on the same day. C

[42] Had the learned trial judge taken the above facts and circumstances into consideration, he cannot possibly conclude that the first defendant was a bona fide purchaser for valuable consideration, so as to be protected under s 340(3) of the Code. To me, the first defendant had acted hastily. He concluded the sale without any proper investigation into the title or the persons claiming to be proprietors. No doubt he had every right to take advantage of the low price that was offered to him but he took the risk. When he embarked into such risk, it cannot be at the expense of the plaintiffs. This is because while he had a choice, the plaintiffs had none. In fact, the plaintiffs were helpless. The plaintiffs could not do anything to prevent the fraud. Even locking the title in a safe would not had help the plaintiffs. In such circumstances the court must not favour the first defendant, over the plaintiffs. To do so, would be doing injustice to the plaintiffs. D

[43] Further, had the evidence adduced in this case been properly considered and assessed by the learned trial judge, a reasonable inference would be that the first defendant knew at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase. In doing so he disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. In *Oliver v Hinton* [1899] Chancery Division 264 Lindley MR said: E

To allow a purchaser who acts with such gross carelessness to deprive a prior innocent mortgagee of her priority would be the greatest injustice. F

[44] So too here. The first defendant is under the obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court. G

[45] Another error on the part of the learned trial judge is this. While he acknowledged the fact that the consideration paid by the first defendant was below H

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- A the government valuation and the plaintiffs' valuer but concluded that 'that by itself cannot negative the first defendant's status as bona fide purchase for valuable consideration bearing in mind that the plaintiffs have failed to adduce evidence of the first defendant to the fraud or forgery'. Clearly, the learned trial judge had misdirected himself on the law. To me, since the first defendant was relying on the
- B proviso of s 340(3) of the Code, that he was a bona fide purchaser for valuable consideration, the evidential burden falls on him. The evidential burden remained with the first defendant. There is no duty on the plaintiffs to prove that the first defendant was a party or privy to the fraud or forgery.
- C [46] For the above reasons, I would allow the plaintiffs' appeal and set aside the order of the High Court in dismissing the plaintiffs' claim against the first defendant. The plaintiffs shall be entitled to the declaration that they are the beneficial and legal owners of the said land. There shall also be a consequential order that the endorsement of the transfer vide presentation No 1299/96 be cancelled and the issue document of title be rectified by the fourth defendant. The plaintiffs are entitled to
- D damages to be assessed by the Registrar of the High Court. They are also entitled to costs of this appeal as well as in the court below. The deposit paid into court shall be refunded to the plaintiffs.
- E [47] The next issue in this appeal is whether the first defendant could attach any liability against the second and third defendants. My respectful view is that, no liability could be attached against the second and third defendants. The first defendant had adduced no evidence at the trial to support the allegation that the second and third defendants were negligent. Moreover from the circumstances of the transaction it clearly indicated that the first defendant took a commercial decision to
- F purchase the land which he admitted was a good bargain. In a single day, he visited the land, decided to purchase it and agreed to the term of the sale including an initial payment of 80% of the purchase price in cash. These were done before the first defendant consulted the second defendant. The second defendant in his evidence stated that when the first defendant came to see him, he informed him (first defendant) of the risk. But according to the second defendant, the first
- G defendant who was a regular client and was familiar with sales and purchase of real property, wanted to proceed with the transaction and urgently too. The second defendant further testified that instructions were given to him to prepare the terms as have already be agreed upon. Certainly, under such circumstances the second and third defendants cannot be blamed. Accordingly the first defendant's claim against
- H the second and third defendants is dismissed with costs here and the court below.
- I [48] Since no liability could be attached against the second and third defendants, the second and third defendants claim for contribution or indemnity against the fourth defendant should also be dismissed. In fact no evidence was adduced in these proceedings that the fourth defendant had acted mala fide or had committed fraud or forgery or had conspired with anybody. The fourth defendant as the Land Administrator was merely performing his statutory function and duties in the registration of the transfer of the said law. Accordingly the second and third defendants claim against fourth defendant is dismissed with costs here and the court below.

Hasan Lah JCA:

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[49] I have had the advantage of reading the judgment of my learned brother Raus Sharif JCA in draft and I am in entire agreement with it. I have nothing more to add.

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Appeal allowed.

Reported by Loo Lai Mee

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